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MSM MALAYSIA HOLDINGS BHD & ORS v. TRANSNATIONAL INSURANCE BROKERS (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LEE KIEN HOW JC
[CIVIL SUIT NO: WA-22NCVC-478-07-2018]
B 12 FEBRUARY 2022

Abstract – *Although an insurance broker has a duty to exercise reasonable care and skill in obtaining insurance in accordance with its principal's instructions, he could not be said to have breached his duty of care after duly performing his duty by submitting the authorisation letter to the hospital and to request for the medical reports as instructed. The insurance broker, who did not sit idle but whose numerous attempts to obtain the required documents from the hospital was fruitless, ought not to be held liable for any delay in the issuance of the medical reports. How soon would the medical reports be prepared is beyond the insurance broker's means and duties.*

TORT: *Negligence – Insurance – Insurance broker – Insurance broker refuse to consider and/or pay proposed sum covered ('PSC') upon deceased's death – Allegation that insurance broker failed to advise and undertake necessary things to give effect to certificate – Whether insurance broker owed duty of care – Whether insurance broker in breach of duty of care and contractual duties – Whether insurance broker performed duty to advise on submission of medical reports pursuant to conditions for PSC – Whether insurance broker had duty to advise on alternative course of action – Whether insurance broker exercised reasonable care and skill in obtaining insurance in accordance with principal's instructions – Whether liability and damages established*

The first plaintiff was a public company listed on the main market of Bursa Malaysia Securities Sdn Bhd. The second and third plaintiffs were the administrators and beneficiaries of the deceased. The defendant was a company that acted as the insurance broker and risk consultant for the first plaintiff at all material times. The defendant had procured a group term takaful for the first plaintiff from Takaful Ikhlas Bhd ('Takaful Ikhlas'), in accordance with the terms and conditions contained in the Group Term Takaful Certificate ('certificate') for the period between 15 September 2015 and 14 September 2016. The following were, *inter alia*, the terms and conditions of the certificate: (i) that the 'free cover limit' was for the sum of RM1 million ('FCL'); and (ii) that every person(s) whose cover exceeded the maximum sum under the FCL shall produce health evidence in the form and manner prescribed by Takaful Ikhlas before such coverage under the certificate shall become effective. Later, the first plaintiff requested for the FCL to be increased in respect of several of its members and/or employees

('selected employees'). For the deceased, the proposed sum covered and increase was in the sum of RM5,990,400 ('PSC'). To do so, the selected employees, including the deceased, were to comply with the requirement to undergo medical examination. Any failure to do so would result in the cover sum for the particular staff to remain at RM1 million as provided under the FCL. The dispute arose when the deceased passed away. The medical reports had yet to be procured and furnished to Takaful Ikhlas. Consequently, Takaful Ikhlas only paid out the FCL for the deceased because of the non-submission of the medical reports. The plaintiffs' stance was that the production of the medical reports was wrongfully delayed by the defendant and thus causing the cover sum for the deceased to remain at the FCL, namely RM1 million only. The defendant denied that it had breached any duty to the first plaintiff in regard to the application for the PSC. The defendant stressed that its duty was to advise the first plaintiff and the deceased to undergo a medical examination and it had done so rightly. Dissatisfied, the plaintiff filed the present suit against the defendant, seeking the following, amongst others, damages for breach of contract and negligence. The plaintiffs' submitted that (i) the defendant was liable to the first plaintiff for damages due to Takaful Ikhlas' refusal to consider and/or pay the PSC for the deceased; (ii) the contractual duties of the defendant towards the first plaintiff included advising and undertaking all the things necessary to give effect to the certificate. The duties included, for instance, to furnish the request for Health Evidence to advise on the PSC and to perform express instructions of MSM about the said certificate; (iii) the engagement letter had laid down the contractual duties of the defendant as a broker. This included the duty to perform express instructions by the first plaintiff. PW3 confirmed that the deceased had given instructions to DW3 to submit his medical report from Pantai Hospital to Takaful Ikhlas; and (iv) as a risk consultant under the engagement letter, the defendant had a duty to advise the first plaintiff regarding the submission of the medical reports pursuant to the conditions for the PSC. The defendant's responsibility was to advise the first plaintiff on an alternative course of action to engage the PSC for the deceased and this duty extended to the beneficiaries and the deceased's estates.

Held (dismissing claim):

(1) The duties of the insurance broker, amongst others, were: (i) to ascertain the client's needs; (ii) to take reasonable skill and care to procure the cover which his client had asked for; and (iii) if he failed to obtain what is required, he needs to seek his client's instructions. The defendant had a duty of care to the first plaintiff to exercise reasonable care and skill in obtaining insurance in accordance with its principal's instructions. The defendant's duty as the broker was first and foremost, to submit the medical reports to Pantai Hospital for it to prepare and produce the medical reports. After such reports were issued, the broker's duty was

A to submit the same to Takaful Ikhlas for their consideration. The standard of care owed by the defendant to the plaintiffs was of reasonable care and skill in carrying out its duties. (paras 55, 56, 59 & 63)

(2) The plaintiffs failed to establish that the defendant had breached his professional duty as a broker for the first defendant. What had been established was that the defendant had duly performed the duties by submitting the authorisation letter to Pantai Hospital and to request for the medical reports as instructed. What happened after that and how soon would the medical reports be prepared was beyond the defendant's means and duties. It was undeniable that in this case, despite the submission of the authorisation letter at the end of 2015, during a meeting between Pantai Hospital and a few representatives from each party in April 2016 after the deceased had passed away, the medical reports were not even available yet. Pantai Hospital only issued the medical reports on 11 May 2016 and no proper reason was given. In fact, the defendant did not sit idle and had made numerous attempts to get the medical reports from Pantai Hospital but it was fruitless. It was clear that the defendant should not be held liable for the delay in the issuance of the medical reports. (paras 65-69)

(3) The defendant had not breached its duty as an insurance broker to procure the PSC for the deceased. As the medical examination was the requirement for the PSC to be engaged, the medical examination should have been done in the first place. Thus, the defendant had fulfilled its duties. Better care was not something that could be simply imposed on the defendant. (paras 76 & 77)

(4) There was nothing to establish that the PSC would be engaged by Takaful Ikhlas but for the non-submission of the medical reports. All these medical reports were for the test the deceased had undergone in Pantai Hospital prior to the colonoscopy procedure. Even with these medical reports in place, the deceased still had to undergo other medical tests and examinations for the purpose of the PSC. In other words, even if the medical reports were to be submitted, there was no certainty that the PSC would be engaged. The medical condition of the deceased would be the main consideration here. It was also not shown whether the cause of death of the deceased would be covered under the PSC. The alleged damages suffered by the plaintiffs were just too remote. Since there was no guarantee that the benefit under the PSC would be covered by Takaful Ikhlas, it would not be feasible for the court to determine the amount of damages that need to be awarded. The plaintiffs had not established the causal link between the loss and the defendant. The plaintiffs thus failed to establish liability on the part of the defendant. (paras 82-84, 90 & 92)

Case(s) referred to:

Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd [2014] 5 CLJ 707 HC ***(refd)***

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(refd)***

Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Harvest Trucking Co Ltd v. PB Davis T/A PB Davis Insurance Services [1991] 2 Lloyd's Law Reports 638 ***(dist)***

Hunter v. Hanley [1955] SLT 21 ***(refd)***

JLA Motorsports Sdn Bhd lwn. Ahmad Suhaimi Abdullah & Yang Lain [2020] 1 LNS 689 HC ***(refd)***

Koh Han Boon v. Impower Sdn Bhd & Anor; Richard Tseng [2003] 2 CLJ 648 HC ***(refd)***

Liberty Insurance Bhd v. Marrison Sidai & Anor [2019] 8 CLJ 380 HC ***(refd)***

Md Nazeran Noor Mohamad lwn. Majlis Bandaraya Melaka Bersejarah [2013] 1 LNS 905 HC ***(refd)***

PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd [2008] 1 LNS 679 HC ***(refd)***

Rogers v. Whitaker 16 BMLR 148 ***(refd)***

Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***

Sim & Associates (sue as a firm) v. Alfred Tan [1994] 3 SLR 169 ***(refd)***

Star Media Group Bhd v. Jaks Resources Bhd [2020] 1 LNS 1436 HC ***(refd)***

Swamy v. Matthews & Anor [1967] 1 LNS 174 FC ***(refd)***

Temurun Dinamik Sdn Bhd lwn. Kerajaan Malaysia [2018] 1 LNS 34 HC ***(refd)***

Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***

Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (Third Party) [2010] 1 LNS 670 HC ***(refd)***

Youell v. Bland Welch & Co Ltd (The 'Superhulls' Cover Case') [1990] 2 Lloyd's Rep 431 ***(dist)***

Legislation referred to:

Evidence Act 1950, ss. 5, 9, 11, 16, 48, 59

Rules of Court 2012, O. 40A r. 3

Other source(s) referred to:

Clerk & Lindsell on Tort, 20th edn, para 2-09

For the plaintiffs - Intan Azlina Mazlan; M/s Armiy Rais

For the defendant - Ng Sai Yeang, Tan Shey Min & Tai Wei Jeat; M/s Raja, Darryl & Loh

Reported by Lina E

JUDGMENT

John Lee Kien How JC:

Introduction

[1] MSM Malaysia Holdings Berhad ('first plaintiff') and the beneficiaries of the late Dato' Sheikh Awab bin Sheikh Abod ('the deceased') namely the second and third plaintiffs filed this suit against Transnational Insurance

A Brokers (M) Sdn Bhd ('the defendant') alleging that the defendant had acted negligently and had failed to perform their duty as broker and risk consultant of the first plaintiff.

Background Facts

B **[2]** This first plaintiff is a public company listed on the Main Market of Bursa Malaysia Securities Sdn Bhd and was incorporated pursuant to the Companies Act 1965. The second and third plaintiffs are the administrators and the beneficiaries of the deceased.

[3] Meanwhile, the defendant is a company limited by shares and C incorporated pursuant to the Companies Act 1965. The defendant acted as the insurance broker and risk consultant for the first plaintiff at all material times. The defendant had procured a group term takaful for the first plaintiff from Takaful Ikhlas Berhad ('Takaful Ikhlas') in accordance with the terms and conditions contained in the Group Term Takaful Certificate No. D GTT00447 ('the certificate') for the period between 15 September 2015 and 14 September 2016.

[4] The following were, *inter alia*, the terms and conditions of the certificate:

E (i) That the 'free cover limit' was for the sum of RM1,000,000 (the 'FCL'); and

(ii) That every person(s) whose cover exceeded the maximum sum under the FCL shall produce health evidence in the form and manner prescribed by Takaful Ikhlas before such coverage under the certificate shall F become effective.

[5] Later, the first plaintiff had requested for the FCL to be increased in respect of several of its members and/or employees ('selected employees'). For the deceased, the proposed sum covered and increased was in the sum of RM5,990,400 ('the PSC'). To do so, the selected employees, including the G deceased, were to comply with the requirement to undergo a medical examination. Any failure to do so would result in the cover sum for the particular staff remained at RM1,000,000 million as provided under the FCL.

[6] The dispute arose when the deceased passed away on 14 April 2016. H The medical reports had yet to be procured and furnished to Takaful Ikhlas. Consequently, on 28 July 2016, Takaful Ikhlas only paid out the FCL for the deceased because of the non-submission of the medical reports. The plaintiffs' stance was that at all material times, the production of the medical reports was wrongfully delayed by the defendant and thus causing the cover I sum for the deceased remained at the FCL, namely, RM1million only.

[7] In response, the defendant denied that it has breached any duty to the first plaintiff in regard to the application for the PSC. The defendant stressed that its duty is to advice the first plaintiff and the deceased to undergo a medical examination. It has done so rightly.

[8] As the plaintiffs were not satisfied with the defendant's response, they filed this suit against the defendant ('this suit'). In this suit, the plaintiffs were, in essence seeking the following:

(i) Damages for breach of contract;

(ii) Damages in the sum of RM5,990,400 for negligence or alternatively damages in a sum to be assessed by this Honourable Court;

(iii) Interest on sums found payable by the defendant at the rate of 5% per annum from date of judgment to date of full realisation;

(iv) Costs; and

(v) Such other order as this court thinks fit and proper.

The Trial

[9] During the trial, both parties called four witnesses respectively. The eight witnesses were:

SP1 Datin Rozaini binti Mohd Yusoff

SP2 Nik Ariff Izani bin Nik Ahmed Mazlan

SP3 Norzanariza bt Mohd Pauzi

SP4 Nor'aini binti Hashim

SD1 Roshidi bin Muhammad Shariff

SD2 Muhammad Azwan bin Nazri

SD3 Rozad bin Harin

SD4 Zainal Abidin Aziz

The Plaintiffs' Case

[10] The gist of the first plaintiff's claim was grounded in both contract and the tort of professional negligence, whereas the second and third plaintiffs' claims were only based on the tort of negligence. The plaintiffs submitted that the defendant was liable to the first plaintiff for damages due to Takaful Ikhlas's refusal to consider and/or pay the PSC for the deceased.

[11] The plaintiffs submitted that the contractual duties of the defendant toward the first plaintiff included advising and undertaking all the things necessary to give effect to the certificate. The duties include, for instance, to furnish the request for Health Evidence, to advise on the PSC and to perform express instructions of MSM about the said certificate.

[12] The plaintiffs further submitted that the engagement letter dated 3 September 2015 ('the engagement letter') had laid down the contractual duties of the defendant as a broker. This includes the duty to perform express instructions by the first plaintiff. PW3 confirmed that the deceased had given instructions to DW3 to submit his medical reports from the relevant hospital, namely, Pantai Hospital ('Pantai Hospital') to Takaful Ikhlas.

[13] Moreover, the plaintiffs further premised that as risk consultant under the engagement letter, the defendant had a duty to advise the first plaintiff regarding the submission of the medical reports pursuant to the conditions for the PSC. The defendant's responsibility was to advise the first plaintiff of an alternative course of action to engage the PSC for the deceased. This duty also extended to the beneficiaries and the deceased's estates.

[14] For convenience, I will categorise the witnesses according to the purpose that they were called and set out their testimony in turn.

SP1

[15] SP1 is also the second plaintiff and the widow of the deceased in this case. SP1 had testified during the trial as one of the beneficiaries of the deceased, claiming that they had suffered loss because of the defendant's actions in failing to advise and/or to obtain the PSC.

[16] SP1 stated that since Takaful Ikhlas did not engage the PSC, the deceased's estate and his beneficiaries have been deprived of the sum it would get had the PSC been committed. The said amount would be RM5,990,400.

[17] At all material time, SP1 was not employed with the first plaintiff and her participation in this trial was because she was one of the beneficiaries.

SP2

[18] SP2 is a Director of Employee Benefits of Polisea Sdn Bhd which deals with retail and corporate employee benefits insurance and general insurance. He was asked about his normal practice in such situation and his interpretation of certain documents.

SP3

[19] SP3 was employed as an executive of the Human Resource Division of the first plaintiff at the material time between 2014 and 2016. SP3 testified that one of the requirements for the employee to be insured for the PSC was a medical check-up. SP3 also testified that the deceased had authorised Pantai Hospital to disclose to Takaful Ikhlas the requested information and medical reports pertaining to the required medical examination.

[20] Moreover, SP3 candidly testified that the defendant would not have been able to collect medical reports at that time. At the material time, Pantai Hospital still had not produced the said medical reports of the deceased. Nevertheless, during re-examination, she stated that the deceased had specifically asked the defendant to obtain those medical reports from Pantai Hospital.

SP4

[21] SP4 was the Vice President of Human Resources for the first plaintiff at the material time. SP4 had testified that at the time, the deceased had undergone a routine colonoscopy procedure at Pantai Hospital and had undertaken examinations previously that would satisfy the medical reports required by Takaful Ikhlas except for the treadmill test. SP4 further testified that in view that the deceased has done medical examination prior to the colonoscopy procedure, the same medical records could be submitted to Takaful Ikhlas for the PSC for Takaful Ikhlas consideration.

[22] SP4 also testified that the defendant owed a duty of care towards the first plaintiff where there were required to advise, negotiate, and procure and administer the insurance policy for the first plaintiff. The defendant had failed to perform their duty by failing to advise the first plaintiff of the benefits of the PSC and failed to procure the medical reports from Pantai Hospital and furnish the same to Takaful Ikhlas for its consideration and/or to engage the PSC for the deceased.

The Defendant's Case

[23] In reply to the plaintiffs' claim, the defendant submitted that it had duly complied with its contractual obligations as the appointed insurance broker and risk consultant. Further, at all material times, the first plaintiff understood the cover under the certificate was at the amount of FCL unless the selected employees had undergone the medical examinations as required and the medical records of the medical examinations were submitted to Takaful Ikhlas for its consideration to increase the cover and to engage the PSC.

[24] The defendant also premised that they had duly complied with all contractual duties to the first plaintiff by attending to the claim when the deceased passed away. Takaful Ikhlas had made payment of the FCL to the first plaintiff. The defendant had reminded the first plaintiff of the need for the selected employees to comply with the requirement to undergo the medical examinations. It has also arranged for and reminded the first plaintiff that Dytan Health on-Line' ("Dytan"), a mobile paramedic company appointed by Takaful Ikhlas, was available to assist with the medical examinations. With prior arrangement and appointment, Dytan team could come to the premise of the first plaintiff to conduct medical examinations for the selected employees.

[25] Furthermore, the defendant had also made numerous attempts to collect the deceased's medical reports from Pantai Hospital. However, those medical reports were only given to Takaful Ikhlas after the deceased passed away.

SD1

[26] In 2016, SD1 was the "Medical Records Manager" at Pantai Hospital. He is still under the employment of Pantai Hospital having the position of "Manager of Health Information Department". SD1 testified that he, on 13 May 2016, had sent an email to SP4 informing her that all the medical records of the deceased had been sent to the defendant, except for (i) Personal Health Declaration, (ii) Full Medical Examination and (iii) HIV test. SD1 had also made an apology for the delay in providing the medical records.

SD2

[27] SD2 was the Assistant Vice President of the Corporate Solutions Department in Takaful Ikhlas. SD2 had testified that Takaful Ikhlas had provided the certificate to the first plaintiff for the period of 15 September 2015 and 14 September 2016. As the first plaintiff was the certificate holder, any benefit would be paid to them. It was stated in the certificate that, all eligible employees of the first plaintiff were entitled to the FCL of RM1,000,000.

[28] SD2 further testified that Takaful Ikhlas had paid a total of RM1,005,000 to the first plaintiff under the FCL with an additional benefit of RM5,000 as funeral expenses. This is because Takaful Ikhlas had rejected the application to increase the coverage of the deceased to the PSC.

SD3

[29] SD3 was an employee of the defendant holding position as the Assistant Manager at the material time. SD3 testified that a medical or health evidence is a need for Takaful Ikhlas to consider the PSC. Therefore, Takaful Ikhlas had appointed Dytan to assist the selected employees of the first plaintiff with the medical examinations. The defendant then received the authorisation letter by the deceased to retrieve the medical reports from Pantai Hospital.

[30] SD3 further testified that after receiving the letter, he went to Pantai Hospital and submitted the same in order to procure the medical reports, but the medical reports were only issued on 11 May 2016. It was also testified that three of the seven documents were not produced by Pantai Hospital, namely, (i) Personal Health Declaration, (ii) Full Medical Examination and (iii) HIV test.

SD4

[31] SD4 was the Head of Transnational Insurance Brokers (M) Sdn Bhd West Malaysia since April 2014 and had retired in April 2019. SD4 had explained that when Takaful Ikhlas issued the certificate to the first plaintiff, Takaful Ikhlas would pay commission to the defendant upon the first plaintiff agreeing to the policy in the certificate.

[32] SD4 also testified that he and SD3 were never aware of the deceased's condition at the time as the defendant did not have information or the details of the medical examinations which the deceased had undertaken and the medical reports that were to be produced. On 14 April 2016, one of the employees from the first plaintiff informed SD3 that the deceased had passed away.

[33] SD4 further testified that the medical reports were only ready on 11 May 2016 and were forwarded to Takaful Ikhlas on 12 May 2016. On 28 July 2016, Takaful Ikhlas had issued a letter to the first plaintiff informing that the sum of RM1,0005,000 was deposited to the first plaintiff's account pursuant to the certificate.

Issues

[34] Before the trial, the parties had agreed on the following issues to be tried:

(i) What the terms of appointment of the defendant as insurance brokers to the first plaintiff, pursuant to the first plaintiff's letter dated 3 September 2015 were and if any of the terms were breached;

(ii) Whether the defendant owed any duties as insurance brokers to the first plaintiff and/or the first plaintiff's employees and if any, were any of the duties breached?;

(iii) In the event that questions (i) and/or (ii) are answered in the affirmative, whether the defendant caused the plaintiffs to suffer any loss and if any, the amount which the defendant is liable for;

(iv) Whether the second and third plaintiffs, have cause of action against the defendant to bring the action herein; and

(v) Whether the plaintiffs are entitled to bring this action against the defendant having accepted the payment of RM1,005,000 from Takaful Ikhlas Berhad under the Takaful Certificate?

Decisions And Findings Of The Court

[35] Basically, the plaintiffs' claim against the defendant is under the law of negligence. The claim for negligence was for the alleged failure of the defendant to take adequate steps to submit the medical reports to Takaful

Ikhlas causing the PSC under the certificate was not engaged. It is my finding that the plaintiffs had failed to prove and establish their claim on the balance of probabilities. I shall address the issues in turn.

Admissibility And Credibility Of SP2's Testimony

[36] The parties disputed with regard to the admissibility and credibility of SP2's testimony. Regarding this issue, the defendant had submitted that SP2 was not a credible witness because (i) the plaintiffs did not comply with O. 40A r. 3 of the Rules of Court 2012; and (ii) SP2's evidence did not satisfy the general provisions of relevancy, nor did he give evidence which forms part of the factual context of the matter.

[37] On the first argument, I must disagree with the defendant because O. 40A of the Rules of Court 2012 ('ROC 2012') does not bar the court from accepting the witness's oral testimony if no expert's opinion was prepared or if it was not done in accordance with to O. 40A r. 3.

[38] While O. 40A r. 3 detects that written expert opinion needs to be tendered in accordance with the format laid down in it, there is nothing to hinder the witnesses from giving their oral testimony stating their opinion as to facts. As submitted by the plaintiffs, SP2 is not an expert witness. Rather, he is a witness as to facts. Hence, he has not given any written expert opinion. However, he can still be called as a witness to explain the facts that he knew of. This court may still consider the witness's testimony under s. 59 of the Evidence Act 1950 ('EA 1950') where it states:

Proof of facts by oral evidence

59. All facts, except the documents, may be proved by oral evidence.

[39] In response to the defendant's contention, the plaintiffs submitted that SP2's testimony ought to be accepted because SP2 was called to give evidence for the plaintiffs to establish industry practice of brokers and risk consultants. Section 45(2) of EA 1950 is only relevant to expert witnesses. SP2 was not an expert and was not forming an opinion as alleged by the defendant. The plaintiffs further submitted that SP2 was a witness of fact and his evidence was relevant and admissible under ss. 5, 9, 11, 16 and 48 of EA 1950. Here, the plaintiffs quoted the cases of *Usahatek Sdn Bhd v. Asia Insurance (M) Bhd; Palaniappan Sinnapan (Third Party)* [2010] 1 LNS 670; [2011] 7 MLRH 784 and *Star Media Group Bhd v. Jaks Resources Bhd* [2020] 1 LNS 1436; [2020] MLRHU 1305.

[40] I'm guided by an earlier High Court decision in *Md Nazeran Noor Mohamad lwn. Majlis Bandaraya Melaka Bersejarah* [2013] 1 LNS 905 (the decision was later adopted in the cases of *Temurun Dinamik Sdn Bhd lwn. Kerajaan Malaysia* [2018] 1 LNS 343 and *JLA Motorsports Sdn Bhd lwn. Ahmad Suhaimi Abdullah & Yang Lain* [2020] 1 LNS 689) where it was held that even

if there were no expert's reports as provided in O. 40A r. 3 of ROC 2012 the expert's opinion may still be considered as provided under s. 59 of EA 1950. To quote His Lordship Zulfikli Bakar J in *Md Nazeran* (*supra*):

> **4. Liabiliti (Bertanggungan)**
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> …
>
> 4.14 Mahkamah ini juga berpendapat bahawa ketiadaan Laporan Pakar oleh pihak plaintif tidak mencacatkan keterangan lisan pakar (SP2) yang mana boleh diterima di bawah Seksyen 59 Akta Keterangan 1950 yang menyebut segala fakta, kecuali kandungan dokumen-dokumen boleh dibuktikan secara lisan. Keterangan ini pula tidak dapat disangkal oleh pihak Defendan di dalam perbicaraan ini.

[41] The parties need to bear in mind that SP2 is not a technical expert, and as stated by the plaintiffs, SP2 is only a witness of facts. Questions of facts required the decisions and findings of this court; thus I find that there is no issue here.

[42] Having said that, I however agree with the second argument of the defendant that the evidence given by SP2 did not form part of such evidence to assist this court to determine the facts of this dispute. To support the defendant referred to the case of *Koh Han Boon v. Impower Sdn Bhd & Anor; Richard Tseng* [2003] 2 CLJ 648; [2003] MLJU 187.

[43] Looking into SP2's witness statement and testimony, most of the questions were generally on the so-called 'industry practice'. SP2 had given his opinion and views on how the process works. For example, in question 13 of the witness statement, the plaintiffs clearly asked SP2 his opinion and his experience on the matter. Question 13 was as follows:

> Q13. In your opinion and based on your experience, what happens after such a letter is issued to the client?

This is mainly asking the personal opinion and practice of SP2.

[44] Also in questions 12 and 15 for SP2 was asked to basically interpret documents that he is not a part of at the first place. For an ease of reference, these questions are:

> Q12. Your attention is drawn to a letter at page 135 of the Common Agreement Bundle of Documents ("CABD"). Can you explain the nature of this letter?
>
> Q15. In respect of the letter at page 135 of the CABD, is the need to obtain the medical reports mandatory and please explain your answer.

[45] It is trite law that, the law vests in the court the power to interpret legal documents. In our present case, the matter revolves around the letters and insurance documents. This court refers to the case of *Liberty Insurance Bhd v. Marrison Sidai & Anor* [2019] 8 CLJ 380; [2018] MLJU 1267 where His Lordship Mohd Nazlan J (now JCA) stated in his judgment:

> [10] The overarching issue raised in this appeal pertains to the proper interpretation of the policy, including in particular the relevant cover note. It therefore concerns the construction of contract. It is as such apposite for me to reaffirm the important rule that *the law vest in the Courts the power to interpret contracts and legal documents.*
>
> [11] In *Manobaran a/l Ramalingam v. Liberty Insurance Berhad* [2017] 9 CLJ 468, I stated the following:
>
> > [19] *It is rudimentary that the evidence given by witnesses on the interpretation of such contracts and documents is by and largely irrelevant if not entirely inconsequential.* In *Leong Ah Kew & Ors v. Prisma Suria Sdn Bhd* [2015] 8 CLJ 300, I had said thus:
> >
> > > [8] Common law has established a number of important principles in the interpretation of contracts, on of which, especially relevant for present purposes is that the construction of contract is question of law for determination by the court and not by witness through their evidence. In *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:
> > >
> > > > In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that *the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be law, if in his own opinion if were erroneous.*
> > > >
> > > > (emphasis added)

[46] Also, I find support in the case of *Koh Han Boon* (*supra*). In this case the second defendant objected to the plaintiff's proposed second witness, who is a practising advocate and solicitor on the grounds:

(i) that the proposed witness is in no way connected with or involved in the relevant transaction;

(ii) that her evidence or statements as appear in the witness statement clearly show that she was attempting to interpret and construe the contractual terms and conditions of the agreement or contract which is the subject matter of this action;

(iii) that the construction of documents is a matter of law to which is a question solely to be decided by the court; and

(iv) that the proposed witness evidence (as contained in the witness statement) is purely a matter of opinion of a third party who is in no way connected to the dispute at hand, and therefore inadmissible.

[47] His Lordship, Ramly Ali J (as he then was) observed and held (at pp. 653-654) that:

> The said Witness Statement can be conveniently divided into four portions, namely:
>
> (i) her experience (Q1-16);
>
> (ii) her interpretation of the clause in the SPA (Q17-25);
>
> (iii) her opinion on the documentary evidence before the Court (Q26-28); and
>
> (iv) her opinion relating to the issue of negligence (Q29-30).
>
> …
>
> Questions 17-25 and their answers clearly indicate that the proposed witness was doing her part in interpreting some of the clause in the SPA which is the subject matter of the present suit. Again, it must be emphasised here that the proposed witness is in no way involved in drafting or actually dealing with the said SPA.
>
> She is trying to interpret and construe the contractual terms and conditions of the said SPA. In this context, I am in full agreement with the counsel for the second defendant that the construction of clauses under a contract or an agreement is a matter purely and solely to be decided by the court assisted by counsels by way of submissions. It is a question of law. An opinion of law is not admissible. This principle was applied in *Pioneer Shipping Ltd & Ors v. BTP Tioxide Ltd* (1982) AC 724; (1981) 3 WLR 292; (1981) 2 ALL ER 1030, and was followed by Zakaria Yatim J. In *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303.
>
> In that case (*Kassim bin Sulong*) the court dealt with a letter written by Peat Marwick dated 15.6.1987 which was held to be an opinion of law. The Court held:

> The above exhibits clearly state an opinion of law. Mr Puthucheary rightly submitted that opinion of law was not admissible. I agree with him. It is the function of the Court to decide on questions of law.

[48] Ramly Ali J (as he then was) could not be clearer: interpretation of documents is the function of the court. An opinion of law from a non-party to the documents is not admissible. Therefore, the opinion of law of SP2 was not admissible. It is indeed the function of the court to decide on questions of law. The opinion of facts of SP2 is, however, acceptable *albeit* only to explain to this court his personal practise and view.

Claim For Negligence

[49] As in any negligence case, to establish such a claim, it must be established that the defendant has a duty of care towards the plaintiffs, that the defendant has breached this duty, and finally, that the breach of this duty had caused damage to the plaintiffs. I shall now discuss these three elements separately.

What Is The Duty Of The Defendant?

[50] The defendant is an insurance broker. It was appointed by the first plaintiff *via* the engagement letter. The defendant had since procured a group term from Takaful Ikhlas for the first plaintiff. In this case, the plaintiffs alleged that the defendant had breached their duty and as a result Takaful Ikhlas had refused to consider and/or pay the PSC for the deceased under the certificate. It was agreed that the FCL under the certificate covered for the sum of RM1,000,000. It was also agreed that the first plaintiff sought and requested Takaful Ikhlas to increase the insurance cover to the PSC for the sum of RM5,990,400 for the deceased. In order for the said PSC to be engaged, it was stated in the certificate as follows:

(PP 101-102, common bundle, (encl. 34))

> 5. HEALTH EVIDENCE
>
> *5.1 Every Person(s) Covered whose maximum Sum Covered exceeds the Free Cover Limit shall produce health evidence in the form and manner prescribed by the Company before the coverage under this Takaful Certificate shall become effective.*
>
> *5.2 The said Free Cover Limit shall be as specified in the First Schedule or Endorsement thereof, always subject to the PreExisting Condition stated as per Clause 11 of Second Schedule.*
>
> …
>
> *5.5 In the event the findings of the medical examination in respect of the Person(s) Covered are not satisfactory to the Company, the Company shall at its absolute discretion:*

(i) Limit the Sum Covered to the Free Cover Limit; or

(ii) Maintain the Full Sum Covered but impose an increase in the Takaful Contribution in such manner as the Company may deem fit.

5.6 The Company reserves the right to increase the Takaful Contribution in respect of any Person(s) Covered who engages in hazardous activities, as defined by the Company.

5.7 All medical examination and/or test of any Person(s) Covered as required or may be required by the Company shall be conducted by Physicians approved by the Company and all expenses and cost incurred shall be borne by the Company.

(emphasis added)

[51] Undeniably, the defendant owed duties to the plaintiffs. Among others, the specific duty of the defendant was as provided in the engagement letter, which says (common bundle (encl. 34) at p. 94):

... During the tenure of your appointment, you are authorised to negotiate with the relevant insurers on our behalf in respect of all our insurance requirements/matters.

[52] To ascertain the duties of an insurance broker, this court refer to two UK's cases which were subsequently adopted by our local cases. In *Youell v. Bland Welch & Co Ltd (The 'Superhulls' Cover Case')* [1990] 2 Lloyd's Rep 431, it was held (at p. 445):

An insurance broker's duties include the following: *(i) He must ascertain his client's need by instruction or otherwise. (ii) He must take reasonable skill and care to procure the cover which his client has asked for, either expressly or by necessary implication. (iii) If he cannot obtain what is required, he must report in what respects he has failed and seek his client's alternative instructions.* (emphasis added)

[53] Likewise, in *Harvest Trucking Co Ltd v. PB Davis T/A PB Davis Insurance Services* [1991] 2 Lloyd's Law Reports 638, it was held (at 643):

A broker or insurance intermediary is employed to act as a middle man between the person employing him – normally the person requiring insurance – on the one hand, and the proposed insurer or insurers on the other. The broker or other intermediary is normally the agent of the assured. This arises because he is normally employed by the client to obtain insurance …

The ordinary function of the insurance broker or other intermediary is to receive instructions from his principal as to the nature of the risk or risks and the rate or rates of premium at which he wishes to insure, to communicate the material facts to the potential insurers and to obtain insurance for his principal in accordance with his principal's instructions and on the best terms available. The liability of an insurance agent to his employer for negligence is comparable to that of any agent. He is bound to exercise reasonable care in the duties which he has undertaken …

(emphasis added)

[54] These two cases were adopted by Her Ladyship SM Komathy Suppiah JC (as she then was) in *Antara Steel Mills Sdn Bhd v. CIMB Insurance Brokers Sdn Bhd* [2014] 5 CLJ 707; [2014] MLRHU 1345 ([15]-[17]). Although this case was on appeal overruled by the Court of Appeal [2015] MLRAU 184 due to the interpretation of the Arbitration Act, the appellate court agreed and did not interfere on the finding with regard to the duties of a broker.

[55] Based on the authorities above, the duties of the insurance broker, amongst others, are:

(i) to ascertain his clients' needs;

(ii) to take reasonable skill and care to procure the cover which his client has asked for; and

(iii) if he failed to obtain what is required, he needs to seek his client's instruction.

[56] Thus, I agree that the defendant had a duty of care to the first plaintiff as its insurance broker is to exercise reasonable care and skill in obtaining insurance in accordance with its principal's instructions.

[57] The plaintiffs alleged that there was a duty on the defendant to submit the medical reports to Takaful Ikhlas as it has already been given express instructions to obtain medical reports of the deceased. This was indeed the instruction. However, we must take note that the issuance and release of the medical reports, at all time, can only be done by Pantai Hospital.

[58] This was testified by SD1 during cross-examination (notes of proceedings vol. 5 pp. 32-33)

IAM: Ya, En Roshidi, boleh sahkan bahawa ini adalah suatu consent letter yang diberi oleh seorang kepada broker, yang mengarah Pantai Hospital untuk mengeluarkan atau disclose rekod-rekod pesakit kepada brokernya?

ROSHIDI: Boleh saya minta –

IAM: Boleh.

ROSHIDI: Penjelasan, ya? Kalau berdasarkan content yang ada dalam surat ini Dato' Dr Sheikh Awab authorise, maksud memberi kebenaran kepada Pantai Hospital untuk mengeluarkan ataupun to disclose Takaful, kepada Takaful Ikhlas, maklumat dan medical report berkaitan, apa nama, to the record (11:22:56AM inaudible) means as per letter dated. Dan ini adalah untuk membolehkan Pantai Hospital mengeluarkan maklumat berkaitan dengan rekod pesakit.

…

IAM: Dalam pengalaman En Roshidi, ada pernah dapat tak surat seperti ini untuk mengeluarkan rekod-rekod pesakit berkaitan dengan pertanyaan syarikat insurans?

ROSHIDI: Ya, pihak insurans kebiasaan daripada syarikat insurans, untuk memohon untuk mendapatkan maklumat ataupun salinan daripada hospital, berkaitan dengan pesakit.

[59] It seems to me that the consent letter was to authorise the broker to obtain medical reports from Pantai Hospital. The defendant's duty as the broker in this case was first and foremost, to submit the same to Pantai Hospital for it to prepare and produce the medical reports. After such reports were issued, the broker's duty was to submit the same to Takaful Ikhlas for their consideration.

Whether The Defendant Had Breached Its Duties?

[60] Now, the question is whether the defendant had breached its duties under the engagement letter and the express instructions given by the deceased? As a professional, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. As stated in *Halsbury's Laws of Malaysia* para. [380.157]:

> The degree of care required may be higher in respect of a person who is a member of a profession or if he holds himself out as possessing a particular skill; although he need not possess the highest expert skill, he must nevertheless exercise the ordinary skill of an ordinary competent man exercising that particular art. In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession. Further, it is well settled that in professional negligence, the burden is on the plaintiff to establish the standard of care has been breached before the defendant is required to call his witness to rebut the same …

[61] Cases such as *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118; *Rogers v. Whitaker* 16 BMLR 148; *Swamy v. Matthews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138 and *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229; [2007] 1 MLJ 593 are the leading authorities in determining the professional standard of care in negligence cases. Even though these cases were mostly on medical negligence, the core discussion can still be applied in other cases.

[62] In determining whether there was such a breach in this case, this court needs to see whether the defendant's action was within the standard of care of the profession. For this, the plaintiffs need to show and prove to the court that the defendant had breached its duty on the balance of probabilities.

[63] The standard of care owed by the defendant to the plaintiffs is of reasonable care and skill in carrying out its duties. However, this standard is to be judged objectively. It should be noted that departing from accepted

practice and approved practice is not negligent. If it departs from the approved practice, provided it can justify its action, it will not constitute negligence. (See *Hunter v. Hanley* [1955] SLT 21; [2955] SC 200; *Sim & Associates (sue as a firm) v. Alfred Tan* [1994] 3 SLR 169; and *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2008] 1 LNS 679; [2009] 7 MLJ 681) I also rely on the authority of *Shearn Delamore & Co v. Sadacharamani Govindasam*y [2017] 2 CLJ 665; [2017] 1 MLJ 486, a Court of Appeal decision. At p. 674 (CLJ); p. 495 (MLJ), His Lordship Hamid Sultan JCA discussed on the standard of care for professionals:

> [11] In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. In the Federal Court decision of *Swamy v. Matthews & Anor [1968] 1 MLJ 138 at p 139 by FC Barakbah LP and we quote 'Now on the law. A man or a woman who practises a profession is bound to exercise that care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case of Lanophier and Wife v. Phipos [1835-42] All ER Rep 421 Tindal CJ laid down this principle:*
>
> > *Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that all events you shall gain your case nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest, degree of skill. There may be person who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.* (emphasis added)

[64] As discussed in the previous issue, this court agrees with the plaintiffs that the defendant has such duty imposed upon it as greatly explained in the *Youell* (*supra*) and *Harvest Trucking* (*supra*). But unfortunately, these cases can easily be distinguished from our present case. For instance, in the case of *Harvest Trucking* (*supra*), the insurance broker was clearly at fault as he has failed to draw his client's attention to the existence or significance of the insurers' or the takaful companies' security requirement for the large vehicle in May 1985.

[65] In our present case, it is my finding that the plaintiffs failed to establish that the defendant had breached his professional duty as a broker for the first defendant. Throughout the trial, the key issue surrounding this instant case is that the alleged failure of the defendant in not procuring the medical reports in time. The plaintiffs thus alleged that this subsequently led to the PSC cannot be engaged.

[66] What has been established was that the defendant has duly performed the duties by submitting the authorisation letter to Pantai Hospital and to request for the medical reports as instructed. What happened after that and how soon would the medical reports be prepared was beyond the defendant's

means and duties. It is undeniable that in this case, despite the submission of the authorisation letter at the end of 2015, during the meeting between Pantai Hospital and a few representatives from each party in April 2016, the medical reports were not even available yet: (Notes of proceedings vol. 1 p. 23)

NSY: Very well, baik, Yang Arif. I'm much obliged. Very well, I think it's fair. If I may refer Datin, following your husband's passing which I believe was on the 14.04.2016, do you recall attending at the hospital in relation to getting his medical report?

ROZAINI: Yes.

NSY: Yes. Can you recall who attended if you attended personally? Just tell me the persons if you can recall.

ROZAINI: MSM, Puan Noraini and representative of, the PA of Pantai Medical Hospital and I believe it's En Zainal of Transnational and another person I don't know his name and my son, of course. And the medical report department representative.

NSY: So, you would agree with me that you attended personally with these few people.

ROZAINI: MSM, Puan Noraini and representative of, the PA of Pantai Medical Hospital and I believe it's En Zainal of Transnational and another person I don't know his name and my son, of course. And the medical report department representative.

NSY: So, you would agree with me that you attended personally with these few people including from MSM and as well as from Transnational as well as your son. Would you agree with me if I say that the medical report was not released on that day?

ROZAINI: Yes.

NYS: Would you be able to recall why it was not released on that day?

ROZAINI: Vaguely.

NSY: Yes.

ROZAINI: I think there was some problem with the hospital's medical department.

NSY: Alright, what do you mean by that?

ROZAINI: They are tracing back all those documents or something like that.

NSY: So, they were tracing back all the documents and they were not able to give the medical report.

ROZAINI: Yes, I believe so.

NSY: And were you aware that subsequent to that date, you finally received the medical report maybe about a month following his death, his passing, would you be able to recall?

ROZAINI: Yes, I think so, possible.

[67] Pantai Hospital only issued the medical reports on 11 May 2016. No proper reason was given. According to SP1, the representative of Pantai Hospital however has apologised to the deceased family during the meeting immediately after the passing of the deceased. This was confirmed by SP4: (Notes of proceeding SP4 – vol 4 p. 102)

NOR: For the email you referred to, page 235, the apology from the medical records manager.

NSY: Yes.

NOR: This apology is due to the fact that, Pantai did not … the defendant had requested for the form, medical record form to go to a specific doctor instead of surrendering it the Pantai Hospital medical records.

[68] Also, I find that the defendant did not sit idle and had made numerous attempts to get the medical reports from Pantai Hospital. SD3 and SD4 have confirmed this: (Notes of proceedings vol 7 – SD4 at p. 68)

NSY: You have also agreed that you have a duty, that you would service the clients and the contracts, and you would also support the clients in making claims, and you've agreed to that. But at the same time, you disagree that you were negligent in not being able to get these medical reports out to be submitted to Takaful. Now, can you explain how you have nonetheless serviced the clients, but you could not, but you were not negligent in not getting the medical report out? Why do you say this?

ZAINAL: With regards to Pantai Hospital, the issuance of the medical report was in the sole control of Pantai Hospital. We did our best to secure the medical reports by requesting this only a weekly basis, *via* their Medical Reports Department, Pn. Amy. So that's why I said, we did our best in trying to secure the medical reports from Pantai Hospital.

(Notes of proceedings vol. 7 – SD4 at p. 69).

NSY: Alright. And you also did not respond specifically to the matters at page 185. Now, what did you do after this email was sent to you on May 11th. What was your, what did you do? Because you didn't respond specifically.

ZAINAL: I think what we do was chased Pantai Hospital for the medical reports.

(Notes of proceedings vol 6 – SD3 at pp. 31-32)

IAM: Dengan arahan untuk memperolehi rekod Dato' Zainal di Pantai Hospital. Betul?

ROZAD: Betul.

IAM: Dan selepas itu, En Rozad pergi ke Pantai Hospital, Betul?

ROZAD: Betul.

IAM: Dan jumpa Bahagian Rekod?

ROZAD: Betul.

[69] Moreover, SD1 from Pantai Hospital has confirmed that normally, the medical reports could be ready within one week. Thus, it is clear that the defendant should not be held liable for the delay in the issuance of the medical reports in this case. The defendant had approached Pantai Hospital multiple times to obtain the medical reports. However, it was fruitless. SD1 himself who was the Medical Record Manager of Pantai Hospital had testified that there was such delay by the hospital: (Notes of proceedings vol. 5 pp. 42-43)

IAM: Ok? Dan En Roshidi ada tulis di sini, 'This is to update you with regards to the issue of delay in complying with the request for the insurance broker in getting a copy, getting the copy of the test investigation results of Allahyarham.' En Roshidi boleh confirm dan sahkan bahawa terdapat kelewatan dalam kes ini seperti yang telah dituliskan oleh En Roshidi?

ROSHIDI: Kalau ikutkan, berdasarkan apa yang ada ini saya mengaku, memang ada kelewatan di situ dan saya, seperti yang saya maklumkan tadi, saya hanya mengetahui tentang ini ketika benda ini dibawa dalam mesyuarat dan dimaklumkan oleh pihak daripada Datin –

IAM: Ya?

ROSHIDI: Bahawa beliau telah memohon lah, untuk mendapatkan laporan perubatan.

…

IAM: Berapa cepat itu?

ROSHIDI: Saya boleh katakan, kalau untuk permohonan salinan untuk lab test, X-ray apa semua itu, kita boleh lakukan dalam tempoh satu minggu pun, kita boleh selesaikan, paling lambat itu.

[70] This was agreed by SP3 during cross-examination. Besides, SP3 who is still an employee of the first plaintiff also agreed that the defendant is not to be blamed for the delay in the issuance of those medical reports: (Notes of proceedings vol. 4 pp. 40-41)

TWJ: And in the same paragraph, you see that, 'have to wait until the legal process complete, then they will pass the report to Dr Meshvinder.' Do you agree that due to legal issue between Dato' Sheikh and Pantai, the medical reports cannot be released even as at 29th April?

NORZANA: Yes, I agree.

TWJ: And do you agree that the Defendant would not have been able to collect medical report at that time, because nothing has been released?

NORZANA: Yes, I agree.

TWJ: And you would agree that the delay was not caused by the defendant? The delay in procuring the medical reports was not caused by the defendant, because there were nothing to be collected at that time. Do you agree?

NORZANA: Yes, I agree.

[71] Clearly, only after the medical reports were made available to the defendant, would the defendant be able to forward the same to Takaful Ikhlas for its consideration. If they were available, the defendant would retrieve them. The authorisation letter which was given to SD3 in early December 2015 was submitted to Pantai Hospital approaching the third week of December 2015. In our case, it was crystal clear that Pantai Hospital did not issue the same until almost a month after the passing of the deceased which was about four and a half months after the authorisation letter was submitted by the defendant to them. What can the defendant do if the medical reports were not ready to be retrieved? They have tried communicating with Pantai Hospital regarding the medical reports. Yet, the reports were never produced until about one month after the passing of the deceased.

[72] The plaintiffs further premised that the defendant also had a duty to alert or warn the first plaintiff about the delay and subsequently, give advice of an alternative course of action to engage the proposed sum covered. The plaintiffs then alleged that the defendant in our present case has failed to do so. In this regard, I have to disagree with the plaintiffs' contention. This is because the defendant had sent several emails informing the said delay and had reminded the first plaintiff so that the selected employees underwent the medical examinations. Those emails are produced in the common bundle of documents at pp. 144-152.

[73] For ease of reference, one of the emails at p. 151 dated 24 February 2016 is reproduced here:

> Assalamualaikum wrt. wbt. Puan,
>
> As per our telephone conversation, we attached herewith list of participants required to undergo medical examination for your attention and further action.
>
> *Kindly inform them to comply with the requirements to enable Takaful Ikhlas Bhd proceed with the pending additional cover, otherwise cover will remain at RM1,000,000.00 million of the approved FCL or NIL coverage* due to Participant Age above 64 years old.
>
> To assist your employees, Takaful Ikhlas Bhd has appointed a mobile paramedic – Dytan Health-on-Line to arrange for the necessary medical check-up. However, kindly arrange for the appointment at lease one week before the date the employee wishes to perform the medical check-up.
>
> Name of Paramedic: Dytan Health On-Line Sdn Bhd
>
> Tel. No. 03 2162 4242
>
> We trust the enclosures are in order and please contact us if you required any further assistance or clarification.
>
> Thank you.

[74] This was also agreed by SP3's testimony during cross-examinations: (Notes of proceedings at p. 35)

TWJ: So as at 24th February here, do you agree that the Defendant has once again remanded the First Plaintiff to comply with the requirements to enable Takaful Ikhlas to proceed with the pending additional cover? Agree?

NORZANA: Yes, I agree.

TWJ: And then again, the Defendant has also reminded that to assist employees, Takaful Ikhlas has appointed a mobile paramedic, Dytan.

NORZANA: Yes.

TWJ: And you will agree that the details of Dytan, meaning the telephone number is also listed here in this email?

NORZANA: Yes.

TWJ: And this would entail them going for medical examinations.

NORZANA: Yes.

[75] Besides, the defendant had tried to assist the first plaintiff with regard to the medical examinations for selected employees by arranging Dytan to be of service to all selected employees including the deceased. This would indeed ease the process for such medical examinations. This can be seen in the letter from the defendant to the first plaintiff (common bundle (encl. 34) p. 20) which said:

> … To assist your employees, Takaful Ikhlas Bhd has appointed a mobile paramedic – Dytan Health – on – Line to arrange for the necessary medical check-up. However, kindly arrange for the appointment at least one week before the date the employee wishes to perform the medical check-up …

[76] It is this court's view that the defendant has not breached its duty as an insurance broker to procure the PSC for the deceased. As the medical examination was the requirement for the PSC to be engaged, the medical examination should have been done in the first place. The witnesses had testified that the defendant did not sit idly with regards to procuring the Medical Reports from Pantai Hospital and had made numerous attempts to get the said reports. As mentioned earlier, even during the meeting between the Pantai Hospital weeks after the deceased had passed away; the medical report was not even available yet. As affirmed by the witnesses including SD1, the medical record Manager of Pantai Hospital, there was a delay by Pantai Hospital in the issuance of the medical reports in this case. SP3 herself has agreed that the defendant is not to be blamed here.

[77] Thus, the defendant had fulfilled its duties. Better care is not something that can be simply imposed on the defendant. The defendant has not breached any of its duties in our present case. Therefore, the next pertinent question is whether, if at all the defendant has been negligent, the plaintiffs would not have suffered any loss but for that.

Damage

[78] As highlighted earlier, the plaintiffs argued that the non-consideration of the medical reports by Takaful Ikhlas was a direct consequence of the defendant's failure. It is trite that there must be a causal link between the negligence and the damage suffered, and the damage is not too remote from the causative act.

[79] I refer the *Halsbury's Law of Malaysia – Tort*, para [380.011] causation which says:

> The principle of causation is concerned with the relationship between the tortious act and the injury sustained. *There must be a causal connection between the breach of duty and the injury suffered. The law places a burden on the plaintiff to prove on a balance of probabilities, that it was the defendant's breach of duty which caused the injuries.* Courts often look to the test of causation commonly

known as the 'but for' test. It simply means that 'but for' the defendant's negligence act, the injury would not have occurred. It is in essence a factual inquiry and in medical negligence it is often resolved through expert evidence. (emphasis added)

[80] I also find great guidance in the Court of Appeal case of *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29 where His Lordship Mohd Hishamudin Yunus JCA in delivering judgment of the court held that:

[30] It is significant to note that despite the first defendant having a counter-claim, yet she did not come to court to give evidence to prove her claim against the first plaintiff.

[31] In our judgment, the plaintiffs' have failed to prove on a balance of probabilities that it was the excavation work, that was being carried out by the third defendant (the independent contractor) on the first defendant's land (now leased to the second defendant), that had caused the retaining wall on the first plaintiff's land to collapse.

[32] It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. The passage found in para 2-01 of the text of Clerk & Lindsell on Tort (20th Ed), states this basic principle in the following manner:

In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage. In the torts, and indeed in torts actionable per se if substantial damages are sought, the claimant must establish that:

(1) The defendant's conduct did in fact result in the damage of which he complains; and

(2) The damage is not in law too remote a consequence of the defendant's wrongdoing.

[33] *As such the plaintiffs are duty bound to prove that it was the defendants' act which caused the damage and that the damage caused is not too remote to the defendants' act.* (emphasis added)

[81] The material fact in our present case is that the PSC was subject to the medical conditions of the deceased. SP1 had testified that the health of the deceased has declined after the colonoscopy. This is as per her witness' statement:

Q6. Between the period of September 2015 to April 2016, can you tell this Honourable Court the health status of the late Dato' Sheikh?

A. On 1st September 2015, the late Dato' Sheikh underwent a standard colonoscopy procedure. It was a routine procedure that was scheduled for him on a yearly basis. Prior to this procedure, the late

> Dato' Sheikh was in good health. He was at the time 55 years old and was healthy and active. By this, I mean that he didn't suffer from any chronic disease or ailments. He played and enjoyed a lot of sports like badminton, tennis and golf.
>
> **The colonoscopy had complications which resulted in a rapid decline of his health. In those 6 to 7 months, he lost 12 kgs and went from 72 kg to 60 kg.**
>
> During this time also, he suffered from severe abdominal pain where the doctor prescribed painkillers for him. Even so, at times, he would wake up in the middle of the night and go to the hospital requesting for stronger painkillers as the pain was unbearable even with the prescribed painkillers.
>
> Further, his mobility was very much affected where he had to be in a wheelchair. He would not be able to mobilise around without the help of another.
>
> **So, I would say that he went from being a normal healthy 55-year-old to someone with a lot of health complications.**
>
> (emphasis added)

[82] There is nothing to establish that the PSC would be engaged by Takaful Ikhlas but for the non-submission of the medical reports. All these medical reports were for the test the deceased had undergone in Pantai Hospital prior to the colonoscopy procedure. Also, the witnesses had agreed that even with these medical reports in place, the deceased still have to undergo other medical tests and examinations (for example, the treadmill test) for the purpose of the PSC. In other words, even if the medical reports were to be submitted, there is no certainty that the PSC would be engaged. The certificate has clearly stated that (pp. 101-102, common bundle (encl. 34))

> *5.1 Every Person(s) Covered whose maximum Sum Covered exceeds the Free Cover Limit shall produce health evidence in the form and manner prescribed by the Company before the coverage under this Takaful Certificate shall become effective.*
>
> …
>
> *5.5 In the event the findings of the medical examination in respect of the Person(s) Covered are not satisfactory to the Company, the Company shall at its absolute discretion:*
>
> *i) Limit the Sum Covered to the Free Cover Limit; or*
>
> *ii) Maintain the Full Sum Covered but impose an increase in the Takaful Contribution in such manner as the Company may deem fit.*
>
> (emphasis added)

[83] The medical condition of the deceased would be the main consideration here. Even with the medical reports (for the procedures previously done/undergone by the deceased in Pantai Hospital), there is no certainty that Takaful Ikhlas or the re-insurer (or re-takaful operator) would engage PSC. The plaintiffs have not provided any evidence to establish such assurance.

[84] Also, it was not shown to the court whether the cause of death of the deceased would be covered under the PSC. It was also repeatedly explained during the trial that the PSC would be based on the consideration of Takaful Ikhlas and the re-insurer (or re-takaful operator). There is no such guarantee given. The fact that the deceased had failed to do the medical examination as requested is not helping the plaintiffs' case. (Notes of proceeding vol. 5 p. 59, cross-examine of SD2 from Takaful Ikhlas).

IAM: Yes, for the proposed sum covered. Ok. It is generally acceptable to say that Takaful will increase it, the sum covered to the increased sum subject to payment of contribution. Would you agree with that statement?

AZWAN: No.

IAM: No. It is subject to medical?

AZWAN: Medical.

IAM: Ok.

YA: So, meaning it is subject to extra premium and subject to medical. Correct?

IAM: Is subject to medical, Yang Arif.

AZWAN: Subject to medical.

YA: Only subject to medical, is it?

IAM: So, you would say, it would be critical for medical evidence be produced for it to be considered?

AZWAN: Yes.

[85] It is also an agreed fact that the defendant has *via* letter dated 21 October 2015 to the first plaintiff stressed that the participants for the PSC need to comply with the requirements or the insured will remain at the amount of FCL.

> We are pleased to enclose the following documents for your kind attention and further action:
>
> 1. Group Term Takaful Master Certificates issued by Takaful Ikhlas Bhd

2. Debit Note No. DN15-01271/15 amounting to RM79,021.37

3. Invoice Details / List of Participant No. 302049

4. List of participants required to **undergo medical examination.**

For employees falling under item no. 4 above, kindly inform them to comply to the requirements to enable Takaful Ikhlas Bhd to process the pending cover, otherwise cover will remain at RM1,000,000.00 million of the approved FCL. (emphasis added)

[86] Clearly, the medical examinations were the utmost requirement for the PSC. Only with the medical examination, Takaful Ikhlas and/or the re-insurer (or re-takaful operator) could know the medical condition of the participants and determine whether to engage the PSC. As stated earlier, the letter dated 21 October 2015 has stressed this. Also, as mentioned earlier, the certificate has clearly stated that (pp. 101-102, common bundle (encl. 34)).

5.2 Every Person(s) Covered whose maximum Sum Covered exceeds the Free Cover Limit shall produce health evidence in the form and manner prescribed by the Company before the coverage under this Takaful Certificate shall become effective.

…

5.5 In the event the findings of the medical examination in respect of the Person(s) Covered are not satisfactory to the Company, the Company shall at its absolute discretion:

(i) Limit the Sum Covered to the Free Cover Limit; or

(ii) Maintain the Full Sum Covered but impose an increase in the Takaful Contribution in such manner as the Company may deem fit.

(emphasis added)

[87] The plaintiff has also failed to fulfil the 'but for' test commonly adopted in such cases. In this regard, the 'but for' test is important in determining whether or not the defendant's act was the main factor causing the damage suffered by the plaintiffs. The text in para. 2-09 in *Clerk & Lindsell on Tort* (20th edn) states that:

The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with *the effective cause of the resulting damage in order to assign responsibility to that damage.* The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to

assign responsibility to that damage. *The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?* (emphasis added)

[88] Thus in *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368; [2017] 4 MLJ 207, a case similar to our present case *albeit* involving legal profession and not insurance broker, Harmindar Singh Dhaliwal JCA (as he then was) had held that:

[33] *The 'but for' test simply means that 'but for' the defendant's negligent act, the harm would not have occurred.* Applying the 'but for' test in the present case, the question is whether the plaintiffs' damage would have accrued 'but for' the defendants' negligence. In our view, *the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period. That had nothing to do with the defendants as solicitors. It was indeed a matter entirely within the control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendants.* (emphasis added)

[89] In a similar vein, on the balance of probability, the plaintiffs have failed to fulfil the "but for" test and show that but for the defendant's negligence (if any) the PSC would be engaged by Takaful Ikhlas and RM5,990,400 would definitely be paid out to the plaintiffs. Even if the defendant is to be blamed for the delay in submitting the authorisation letter to Pantai Hospital (as alleged by the plaintiffs, it was given by the deceased to SP3 during the first week of December 2015 and was submitted to Pantai Hospital during the third week of December 2015) or for the breach of any other duties, the application of this 'but for' test would show that the defendant cannot be held liable for the damage of the plaintiffs. The proximate cause of the plaintiffs' losses is the delay in the issuance of the medical reports by Pantai Hospital, the failure to undergo the medical examination and the failure to forward medical evidence to the satisfaction of Takaful Ikhlas. This had nothing to do with the defendant as the insurance broker and risk consultant. It was indeed a matter entirely within the control of the first plaintiff, the deceased and Pantai Hospital. This is to say, there was no nexus between the exercise of care and skill by the defendant to the engagement or otherwise of the PSC. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendant.

[90] Therefore, in the court's view, there is no evidence suggesting that the defendant had breached their duty toward the plaintiffs. The alleged damage suffered by the plaintiffs is just too remote. The delay in the issuance of the medical reports by Pantai Hospital has nothing to do with the defendant. Again, even if the deceased medical reports were received earlier, there was no guarantee that the benefit under the PSC would be engaged.

[91] Since there was no guarantee that the benefit under the PSC would be covered by Takaful Ikhlas, it will not be feasible for this court to determine the amount of damages that need to be awarded. This court referred to the Federal Court case of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269; [2014] 4 MLJ 465, where His Lordship Ariffin Zakaria CJ discussed as follows:

> [31] The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered. The general principle governing the measure of damages has its origin in the words of Lord Blackburn in *Livingstone v. Raywards Coal Co* (1880) 5 App Cas 25 where he said:
>
> > … that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.
>
> [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (see s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.
>
> [33] *Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damages that he had in fact suffered to the satisfaction of the court.* This principle is borne out in the case of *Bonham-Carter v. Hyde Park Hotel* (1948) 64 TLR 177 where Lord Goddard CJ observed:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.
>
> This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Tech Puat v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777.
>
> [34] The claim by the plaintiff in the present case is for general and special damages arising out of breach of contract and/or negligence. *Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely asserts that had suffered such damages without proving it* (see *Admiralty Comrs v. SS Susquehanna [1926] AC 655 and Bolag v. Hutchison* [1905] AC 515). (emphasis added)

[92] Thus, the plaintiffs had not established the causal link between the loss and the defendant. When the plaintiffs failed to do so, even if the defendant has been negligent or had breached its duties, the defendant cannot be held liable. The chain of causation is too remote here. The proximate cause of the plaintiffs' losses is the delay in the issuance of the medical reports by Pantai Hospital, the failure to undergo the medical examination and to forward medical evidence to the satisfaction of Takaful Ikhlas. There was no nexus between the exercise of care and skill by the defendant to the engagement or otherwise of the PSC. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendant.

Conclusion

[93] To sum up, this court finds that the plaintiffs are unable to prove to this court on the balance of probabilities that the defendant had breached its duties against the plaintiffs and that the damage is in any way attributed to the defendant. I, therefore, order that this suit be dismissed with costs.